

1921
December, 6.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BASHIR-UN-NISSA BIBI (DEFENDANT) v. ABDUR RAHMAN AND OTHERS
(PLAINTIFFS.)*

Act No. IX of 1903 (Indian Limitation Act), schedule I, articles 49 and 120

—Suit by a Muhammadan heir for share in inheritance—Limitation.

Held that a suit by an heir of a Muhammadan to recover a share of the movable property left by the deceased is governed by article 120, and not by article 49, of the first schedule to the Indian Limitation Act, 1908. Mahomed Bissat Ali v. Hasin Banu (1) followed.

THE facts of this case may be briefly stated as follows:—

The plaintiffs, claiming to be some of the heirs of one Fazal Haq, deceased, sued to recover possession of a certain share in the property left by him, on the allegation that this share belonged to them by right of inheritance but was in the possession of the widow. Fazal Haq had died on the 31st of August, 1909, and the suit was brought on the 31st of August, 1915. Besides a share in the immovable property the plaintiffs claimed a fourth share in certain specified movable property and cash, alleged to have been left by Fazal Haq, and prayed that one-fourth of the movable properties might be apportioned and awarded to them or, if that was not done, its value might be awarded in cash. One of the pleas raised by the defendant was that the claim for the movable properties was barred by time. The defendant also pleaded that besides the heirs enumerated by the plaintiffs Fazal Haq had left another heir, namely, his step-sister Musammat Azmat-un-nissa, and therefore the plaintiffs' share in the inheritance was less than that asserted by them. The court of first instance held that article 120 of the Limitation Act applied to the claim for movable properties and that the suit was, therefore, within time. The court, however, did not arrive at a definite finding on the question whether Fazal Haq had left a step-sister. The claim was decreed in full in respect of the immovable property and a certain sum was awarded to the plaintiffs in respect of the movable property. The defendant appealed to the High Court and at the first hearing an issue was remanded to the lower court for determination whether Fazal Haq had left a step-sister,

* First Appeal No. 932 of 1916, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 9th of June, 1916.

Musammæt Azmat-un-nissa. On return of the finding the appeal came on for final hearing.

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Dr. S. M. Sulaiman and Dr. Surendra Nath Sen, for the appellants.

Mr. B. E. O'Connor, Maulvi Iqbal Ahmad and the Hon'ble Saiyid Raza Ali, for the respondents.

MEARS, C. J., and BANERJI, J.:—This appeal was argued on the 21st of December, 1920, before a Bench consisting of the Chief Justice and Mr. Justice Knox.

It was evident that the matter could not be disposed of satisfactorily until the Court was informed whether Muhammad Fazal Haq had left a step-sister by the name of Musammæt Azmat-un-nissa. The Bench, therefore, referred that question to the lower court with instructions to decide that issue. On the 19th of November of this year the lower court reported that nobody cared to prosecute the case and, therefore, that issue had never been determined. In those circumstances Dr. Sen says very fairly that he cannot resist the judgment of the lower court on the issue as regards the share of the immovable property and mesne profits. There was also a claim for a fourth share in movables and for partition so that specific articles could be allotted to the plaintiffs. The claim as actually put forward asked that the cash and articles mentioned in a certain list might be partitioned and one-fourth of the cash and one-fourth of the articles awarded to the plaintiffs. The claim then continued by putting a value upon the movables, dividing that by four, and asking that if the cash and articles were not partitioned Rs. 3,982 might be awarded as the price of the said articles. Dr. Sen contends that the method in which that claim is put forward brings the suit within article 49 of the first schedule to the Limitation Act of 1908. As admittedly Fazal Haq died more than three years before the institution of the action this claim for a partition of cash and movables would be time-barred if article 49 were the article to be applied. The lower court felt itself unable to distinguish the case of *Mahomed Riasat Ali v. Hasin Banu* (1), and we agree that the facts of this particular case before us are governed by the decision in

(1) (1893) I. L. R., 21 Cal., 167.

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that case. The same point was taken there. It was said that the claim for partition of movables was barred because the claim fell within article 49. The Privy Council did not agree with that contention but held that the claim really fell within article 120 inasmuch as there was to be found in this first schedule to the Limitation Act no specific provision for a claim of this kind. As our view in this respect is the same as held by the learned Subordinate Judge, we are of opinion that on both grounds this appeal must be dismissed with costs. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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December, 9.

Before Mr. Justice Lindsay and Mr. Justice Gokul Prasad.
ABDUL HAKIM KHAN (DEFENDANT) v. RAM GOPAL AND OTHERS
(PLAINTIFFS.)*

Act No. I of 1872 (Indian Evidence Act), section 92, proviso (1)—Mortgage deed—Misdescription of property mortgaged—Admissibility of evidence to show what really was the property which the parties intended to be mortgaged.

By a deed executed in 1892 certain items of property were mortgaged, including a share in khata No. 3 in mahal Ismail Beg. The mortgage was renewed in 1897 and in the second deed the words "mahal Ismail Beg" were omitted in the schedule of the properties mortgaged. The mortgage was again renewed in 1907, when in the corresponding part of the schedule there was entered an item "khata No. 3 in mahal Jafar Beg."

Held that it was open to the mortgagee to offer evidence to show that what was intended to be mortgaged was a share in mahal Ismail Beg, khata No. 3, and in so doing to refer to the two previous deeds.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. S. M. Sulaiman and Munshi Bhagwati Shankar, for the appellant.

Dr. Surendra Nath Sen, for the respondents.

LINDSAY and GOKUL PRASAD, JJ. :—After hearing the learned counsel in this case we think the appeal must fail and the judgment of the court below must be affirmed.

The question now before us is a question of fact and there is a definite finding by the lower appellate court.

* Second Appeal No. 1246 of 1919, from a decree of Ganga Sahai, Additional Judge of Meerut, dated the 14th of August, 1919, modifying a decree of Kashi Prasad, Additional Subordinate Judge of Meerut, dated the 27th of May, 1919.